(8)

Court, U.S.
L E D
SEP 9 1997
CLERK

No. 97-81

Court, U.S.
F I L E D
SEP 9 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

THE DELAWARE RIVER AND BAY AUTHORITY,
Petitioner,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

---

REPLY BRIEF FOR PETITIONER

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

O. FRANCIS BIONDI
JON E. ABRAMCZYK
MORRIS, NICHOLS, ARSHT & TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200

Counsel for Petitioner

Of Counsel:
WAYNE J. POSITAN
LUM, DANZIS, DRASCO, POSITAN & KLEINBERG, LLC
103 Eisenhower Parkway
Roseland, N.J. 07068
(201) 403-9000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

TABLE OF AUTHORITIES

Cases: Page

Bailey v. *Port Auth. of N.Y. & N.J.*, No. 40149-92 (N.Y. Sup. Ct. May 18, 1994), *aff'd without op.*, 627 N.Y.S.2d 921 (N.Y. App. Div. 1995) 6

Baron v. *Port Auth. of N.Y. & N.J.*, 968 F. Supp. 924 (S.D.N.Y. 1997) 5, 6-7

Bunk v. *Port Auth. of N.Y. & N.J.*, 676 A.2d 118 (N.J. 1996) 6

Cuyler v. *Adams*, 449 U.S. 433 (1981) 9

Delaware River & Bay Auth. v. *Carello*, 222 A.2d 794 (Del. Ch. 1966) 8

Delaware River Joint Toll Bridge Comm'n v. *Colburn*, 310 U.S. 419 (1940) 7

Eastern Paralyzed Veterans Ass'n v. *City of Camden*, 545 A.2d 127 (N.J. 1988) 5-6

Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) 8

Malverty v. *Waterfront Comm'n of N.Y. Harbor*, 524 N.E.2d 421 (N.Y. 1988) ..... *passim*

Oklahoma v. *New Mexico*, 501 U.S. 221 (1991) 8-9

Texas v. *New Mexico*, 462 U.S. 554 (1983) 9

West Virginia ex rel. Dyer v. *Sims*, 341 U.S. 22 (1951) 7, 9

Rules:

S. Ct. Rule 10(b) 7

S. Ct. Rule 10(c) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-81

THE DELAWARE RIVER AND BAY AUTHORITY,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONER

1. As the diverse amicus participation alone confirms, the importance of this case is by no means confined to the "single, mundane question" (Opp. 2) respondents tactically chose to frame in their opposition. The State of Delaware—through its attorney general—has filed a brief in support of certiorari, explaining that the New Jersey high court decision in this case "constitutes a direct affront to Delaware's sovereignty." Del. Br. 8. Three major interstate compact authorities that, along with DRBA, operate in the commercially vital New Jersey region have also filed briefs in support of certiorari, explaining that the decision will impede their operations and eliminate "the very purpose of establishing independent bi-state agencies under the Compact Clause." Port Auth. Br. 4; *see* DRPA Br. 4-5; Waterfront Comm'n Br. 3. And a labor organization representing the employees of several interstate compact agencies has taken the unusual step of filing an amicus brief in opposition to certiorari, an action which says far more about the general importance of this case than anything in the amicus brief itself.

In granting discretionary review, the New Jersey Supreme Court itself recognized this case as one of general importance, *see* Pet. 8, and the court's lengthy opinion and thoughtful dissent are a testament to its significance. To avoid plenary review, respondents attempt to confine the New Jersey Supreme Court ruling to DRBA and this specific Compact, but the decision itself explicitly refutes any such limitation. In adopting the rule of law challenged in the petition, the New Jersey Supreme Court "conclude[d]" in open-ended terms "that a bi-state agency, *such as* the DRBA, is subject to the law of New Jersey when * * * both [compact] states have adopted complementary or parallel legislation." Pet. App. 12a (emphasis added). The court even acknowledged that the "effect" of its decision was implicitly to "modif[y] the Compact," *id.* 12a, confirming that it well understood the import of its ruling.

This in turn prompted a sharp dissent by Justice Garibaldi who—like the majority—squarely addressed the question presented by the petition. Thus, relying upon the New York high court decision in *Malverty* v. *Waterfront Commission of New York Harbor*, 524 N.E.2d 421 (N.Y. 1988), the dissent explained—again, without limitation to DRBA or the Compact here—that "[s]imilar public policy in two states is not sufficient to render one state's legislation applicable to a bi-state agency's employment practice." Pet. App. 19a. *See also id.* 21a ("In conclusion, I find that complementary or parallel state laws cannot repeal the language of the Compact."). The majority's contrary ruling, in the dissent's words, "completely disregards the long-standing precedents requiring legislatures to agree expressly before a state can impose duties and obligations on a bi-state agency." *Id.* 19a-20a.

Respondents suggest that the stark analytical divide between these positions is illusory because the majority acknowledged in passing that " '[a] single state may not

unilaterally impose additional duties on a bi-state agency.' " Opp. 2-3 n.1 (quoting Pet. App. 9a). But, as is clear from the decision itself, and as the dissent explained, the end result if not the *raison d'etre* of the New Jersey Supreme Court approach—what respondents' amicus refers to as the New Jersey doctrine of "parallelism," Grand Lodge Br. 8—is to circumvent this cardinal rule. Thus, the majority reasoned that, "[a]though a single state may not unilaterally impose its will on a bi-state agency, the creator states together may subject the agency to complementary or parallel state legislation," as discerned, that is, by the courts of a single compact state. Pet. App. 10a.

Respondents' efforts to show that New Jersey and Delaware have in fact adopted "complementary or parallel" labor laws or policies are therefore for naught. *See* Opp. 3-6. The federal question presented—the one over which the New Jersey Supreme Court divided—is whether the existence of such general laws or policies permits the courts of one compact state to amend an interstate compact in the absence of the express legislative consent of the compact states or Congress. As elaborated by the amici compact authorities, *see* Port Auth. Br. 4; DRPA Br. 4-5; Waterfront Comm'n Br. 3, the importance of this question is by no means limited to DRBA or the Compact here.[1]

---

[1] As the amici compact authorities have explained, the provision of the DRBA (Article VIII) barring the imposition of any additional duties or obligations upon the Authority without the legislative consent of both states is "common to most compacts." Port Auth. Br. 4. *See, e.g.*, Waterfront Comm'n Br. 4 (reproducing provision). Article XV of the DRBA Compact in no way alters that common command, or otherwise sanctions judicial amendment of the Compact. Rather, it simply confers jurisdiction to hear certain disputes involving the compact authority. *See* Pet. App. 65a (Article XV). Thus, the New Jersey Supreme Court did not mention, let alone invoke, Article XV in "conclud[ing] that a bi-state agency, such as DRBA, is subject to the law of New Jersey when * * * both states have adopted complementary or parallel legislation." Pet. App. 12a.

This case is an ideal vehicle to address this important question. The issue was carefully considered by the court below, producing thoughtful opinions on both sides of the coin. Application of the challenged rule has—as the court itself recognized—"modified the Compact" (Pet. App. 12a), intruding upon DRBA's exclusive authority to "fix and determine * * * all * * * conditions and terms of employment," Compact art. VII(e), by foisting upon DRBA an entirely new obligation in an area of labor relations central to any employer's mission. *See* Pet. 21-22 & n.17.[2] And the decision in this case has brought New Jersey into conflict with its sister compact states over a basic question concerning the construction and governance of numerous interstate compacts, prompting the State of Delaware and the major compact authorities operating in the New Jersey area to urge this Court to grant certiorari.

2a. Respondents are no less adventuresome when it comes to dealing with the obvious conflict implicated by this case, going so far as to suggest that "the holding and rationale of *Malverty* have no pertinence here." Opp. 7.[3] They do so based on the fact that the New York

---

[2] Despite respondents' suggestion to the contrary (Opp. 4-5 & n.2), judicial imposition of this duty plainly contradicts Articles VII(e) and VIII of the Compact, not to mention DRBA's long-standing policy—adopted pursuant to Article VII(e)—that it has no "obligation to engage in collective bargaining with its employees or their chosen representatives." DRBA Personnel Manual art. XIV. Thus, as the dissent explained, the New Jersey decision not only amends but "repeal[s] the language of the Compact." Pet. App. 21a. *See id.* 19a; Del. Br. 8-10. Any suggestion that the State of Delaware—New Jersey's sovereign equal in the operation of DRBA—has consented to this repeal is belied by Delaware's brief in support of certiorari.

[3] Respondents characterize *Malverty* as a "per curiam opinion." Opp. 6. To be clear, *Malverty* is a reported decision of the New York high court that was expressly concurred in by all seven New York high court justices, has full precedential effect, and has been

high court in *Malverty* emphasized that the New York antidiscrimination statute does not state that it was intended to apply to interstate compact authorities or to amend any compact agreement. *See id.* (citing 524 N.E.2d at 422).[4] It is undisputed that the same is true of the New Jersey collective bargaining statute. But the New Jersey Supreme Court below held that such express legislative intent was unnecessary since, "[a]s a matter of public policy, the legislatures of both states have concluded that public employees should have the right of collective negotiation," Pet. App. 12a; whereas the New York high court in *Malverty* held that the fact that the compact "States have evinced the same, or similar public policy * * * by enacting similar 'antidiscrimination' laws is *not* sufficient * * * to render [a compact] properly amended or supplemented," 524 N.E.2d at 422 (emphasis added; citation omitted). The conflict could hardly be more express.

The New Jersey Supreme Court has recognized *Malverty* as contrary authority, standing for the proposition that the "similar public policy of two states does not suffice to render one state's legislation applicable to [a] bi-state Commission[]." *Eastern Paralyzed Veterans Ass'n*

---

cited for the general proposition that interstate compacts may not be altered or amended by courts construing so-called "complementary or parallel" legislation. *See, e.g., Baron* v. *Port Auth. of N.Y. & N.J.*, 968 F. Supp. 924, 929 (S.D.N.Y. 1997); *Eastern Paralyzed Veterans Ass'n* v. *City of Camden*, 545 A.2d 127, 132 (N.J. 1988); Pet. App. 19a.

[4] Respondents and their amicus attempt to portray the New York practice of expressly identifying by *legislation* which laws are intended to apply to interstate compact authorities as "unique." Grand Lodge Br. 15; *see* Opp. 7. But that practice—not the one sanctioned by the court below—is the norm. Thus, when New Jersey and Delaware in fact intended to extend their general environmental laws to DRBA, they each passed nearly identical legislation expressly amending the Compact—which was later approved by Congress—specifically extending the states' general environmental statutes to DRBA. *See* Pet. 16 & n.13.

v. *City of Camden*, 545 A.2d at 132, discussed at Pet. 18. The dissent below expressly invoked the *Malverty* rule in urging the contrary result. Pet. App. 19a. Respondents' own amicus felt obliged to concede that *Malverty* "display[s] a[] degree of displeasure" with the New Jersey doctrine of parallelism. Grand Lodge Br. 14. And respondents themselves all but acknowledged the conflict when, in attempting to side-step *Malverty* in the court below, they argued that, "given the New Jersey * * * courts developing theory of regulation of bi-state agencies," the *Malverty* rule was inapplicable. Reply Br. of Pls.-Resps. in Reply to Br. of *Amicus Curiae* Port Auth. of N.Y. & N.J. in N.J. S. Ct., p. 8.[5]

The federal courts, too, have taken notice of this conflict. As the New York district court recently explained in *Baron* v. *Port Authority of New York and New Jersey*, 968 F. Supp. at 929, in dismissing an argument based on the New Jersey rule:

> Plaintiffs * * * argu[e] that because New York and New Jersey laws against age discrimination are parallel, they are applicable to [the compact agency]. In *Bunk* v. *Port Authority of New York and New Jersey*, 676 A.2d 118 (N.J. 1996), the court found that "* * * [a] bi-state agency * * * *may* be subject to complementary or parallel state legislation." 676 A.2d at 122 (emphasis added). However, in New

---

[5] In the same brief, respondents argued that the decision in *Bailey* v. *Port Authority of New York and New Jersey*, No. 40149-92 (N.Y. Sup. Ct. May 18, 1994), *aff'd without op.*, 627 N.Y.S.2d 921 (N.Y. App. Div. 1995)—in which the New York court, following the *Malverty* approach, rejected the argument that the New York Human Rights Law applied to the Port Authority—was incorrect because, as respondents put it, "the New York court did not consider the crucial issue of whether New York's Human Rights Law and the New Jersey Law Against Discrimination were substantially similar and complementary statutes." Reply Br., p. 9. But of course, while that issue may be "crucial" under the New Jersey approach, it has no place under the conflicting New York rule.

> York it has been established that in order for a law to be applicable to [the compact agency], the statute must *expressly* state that the "legislation [is] amending a certain portion of the 'Compact' *and* that the new law would take effect upon the enactment into law by New Jersey of legislation having an effect identical to New York's legislation." *Malverty* v. *Waterfront Commission of New York Harbor,* 524 N.E.2d 421, 422 (N.Y. 1988) (emphasis added). For New York, "that the two states have evinced the same, or similar, public policy regarding employment opportunities * * * by enacting similar 'antidiscrimination' laws is not sufficient under the express terms of the 'Compact,' " *id.*, to make [the compact agency] subject to the law of either state.

Such a clear conflict of authority concerning the construction and governance of interstate compacts—special instruments of federal law, *see* Pet. 14-15—alone warrants plenary review by this Court. *See* S. Ct. Rule 10(b). But because this conflict directly impacts the operation of numerous interstate compact authorities in a commercially vital region of this country, *see* Pet. 25-27 & n.19; Port Auth. Br. 5-7; Waterfront Comm'n Br. 8-10, and directly infringes the sovereign interests of the compact states in this region, *see* Del. Br. 8, plenary review is especially appropriate. Indeed, because of the "public importance" of disputes of this nature, this Court has seen fit to grant certiorari in cases involving disputes over the construction of a single interstate compact. *Delaware River Joint Toll Bridge Comm'n* v. *Colburn,* 310 U.S. 419, 427 (1940). *See also West Virginia ex rel. Dyer* v. *Sims,* 341 U.S. 22 (1951). As the amicus filings underscore, this case bears directly upon numerous interstate compacts.

b. Respondents are also quite wrong in suggesting that New Jersey and Delaware are in agreement on this issue. Indeed, the State of Delaware urges this Court to grant plenary review because, in working an implied repeal of

the Compact, "the New Jersey high court deprived the Governor, and thus the State, of their basic prerogatives" under the Compact. Del. Br. 9. And, despite respondents' suggestion to the contrary, the decision below is hardly consistent with *Delaware River and Bay Authority* v. *Carello*, 222 A.2d 794 (Del. Ch. 1966). In *Carello* the Delaware court refused to impose upon DRBA the same duty imposed upon it by the New Jersey high court below, because, in the Delaware court's view, doing so would impermissibly amend the Compact without the requisite consent of both States. *Id.* at 798-799.[6] As explained in the petition, the New Jersey courts had shared this view until the decision below brought New Jersey into conflict with Delaware over whether the Authority is required to bargain collectively with its employees. *See* Pet. 18-19.[7]

The New Jersey Supreme Court decision also runs afoul of this Court's own precedents, including those establishing that "bistate entities created by compact * * * are not subject to the unilateral control of any of the States that compose the federal system," *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); that "a congressionally approved compact is both a contract and a statute" that may not be altered by the courts (state or federal), *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235

---

[6] Respondents argue that was simply because of the absence of parallel general legislation, but the *Carello* court specifically noted that "joint action by both Delaware and New Jersey designed to advance the rights of *bridge employees* in the field of collective bargaining"—*i.e.*, legislation specifically directed to DRBA employees —"may well be needed." 222 A.2d at 799 (emphasis added). That is a far cry from the type of general laws and policies that the New Jersey high court relied upon to impose upon DRBA a newfound collective bargaining duty in this case. *See* Pet. App. 12a.

[7] As explained, the New Jersey high court ruling also conflicts with the decisions of the Pennsylvania high court, *see* Pet. 18-19; DRPA Br. 6-10, as well as with the decisions of numerous other state and federal courts beyond the Delaware River Basin. *See* Pet. 19-20 & n.16.

n.5 (1991); *see Texas* v. *New Mexico*, 462 U.S. 554, 566 (1983); and that, as federal law, an interstate compact can only be amended with the consent of Congress, *Cuyler* v. *Adams*, 449 U.S. 433, 438-439 (1981). *See* Pet. 12-16; Del. Br. 4-10. Tellingly, respondents do not even attempt to reconcile the decision with these precedents.[8] Nor do they take issue with this Court's special "function and duty" to resolve disputes of this nature, *Sims*, 341 U.S. at 28; *see* Pet. 29-30, which provides further support for granting certiorari. *See* S. Ct. Rule 10(c).[9]

3. Ordinarily, a state court ruling is confined to the state in which it was rendered and the parties before it. In the field of interstate compacts, however, such a ruling "brings in issue the rights of other States and the United States." *Sims*, 341 U.S. at 28. The New Jersey Supreme Court decision in this case not only has thrown New Jersey into conflict with its neighboring states on an important question of federal law, but has worked an implied repeal of an interstate compact without the legislative

---

[8] Respondents' only response seems to be that "Congressional approval is only necessary to amend the express terms of a compact." Opp. 9. As the dissent below explained, however, the New Jersey high court did just that. *See* Pet. App. 14a ("The Court has done what the Legislatures of New Jersey and Delaware have not—amend the congressionally-approved Interstate Compact"); note 2, *supra*; Pet. 21.

[9] The analytical infirmities of the New Jersey Supreme Court rule are amply demonstrated by the decision below. Respondents' own amicus, however, has highlighted the indeterminate nature of the New Jersey doctrine of parallelism. According to the Grand Lodge: "Legislative enactments need not be 'identical' in each creator state to be given parallel effect; all that is necessary is that the laws be 'substantially similar,' and articulate a 'central' or 'dominant theme' in respective public policies of the states." Grand Lodge Br. 8 (citations to New Jersey court decisons omitted). Such a cavalier inquiry affords none of the protections to the sovereign interests of the compact states mandated by this Court's precedents, *see* Pet. 12-14, and completely disregards the contract principles this Court has employed in construing interstate compacts, *id.* 15 n.12.

consent of the compact states or Congress. It has left the compact states with no recourse but to turn to this Court to protect "their basic prerogatives." Del. Br. 9. And, by inviting "discord and a destruction of the purposes for which * * * bi-state agencies are formed" (Pet. App. 20a), it has threatened interstate compact operations in a region of the country which, to date, has been uniquely served by the interstate compact device, benefiting the Nation as a whole. This Court should grant certiorari and clarify the proper role of state courts in this important federal sphere.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

O. FRANCIS BIONDI
JON E. ABRAMCZYK
MORRIS, NICHOLS, ARSHT
& TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200

Counsel for Petitioner

Of Counsel:
WAYNE J. POSITAN
LUM, DANZIS, DRASCO,
POSITAN & KLEINBERG, LLC
103 Eisenhower Parkway
Roseland, N.J. 07068
(201) 403-9000

* Counsel of Record